IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

NO. 431

CITY OF CORINTH, MISSISSIPPI,

Petitioner,

vs.

FEDERAL POWER COMMISSION,

Respondent,

ALABAMA TENNESSEE NATURAL GAS COMPANY,

Intervenor.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ALABAMA-TENNESSEE NATURAL GAS COMPANY,

Intervenor.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above styled cause on June 29, 1959.

OPINIONS BELOW

The opinion of the Court of Appeals is reported in 268 F2d 10, and a copy is printed as Appendix "A" hereto, *infra* pp. 17. The order of the Federal Power Commission (R. 189) which forms the basis for this action is printed in Appendix "B" hereto, infra, pp. 21.

JURISDICTION

The jurisdiction of this court is invoked under 28 U. S. C., section 1254(1). The jurisdiction of the lower court was invoked under Section 19(b) of the Natural Gas Act (52 Stat. 831; 15 U. S. C., sec. 717r).

QUESTION PRESENTED

Does a court of appeals have power of review under Section 19(b) of the Natural Gas Act of an order of the Federal Power Commission allowing pipeline company to place increased rates into effect under Section 4(d) of the Natural Gas Act, without a hearing, in violation of a fixed rate contract with customer, where customer has timely challenged the jurisdiction of Commission to permit such increase?

STATUTES AND REGULATIONS INVOLVED

52 Stat. 822; 15 USC, § 717c
52 Stat. 831; 15 USC, § 717r
52 Stat. 833; 15 USC, § 717t

STATEMENT OF THE CASE

Alabama-Tennessee Natural Gas Company (Alabama-Tennessee) operates a pipeline from which it delivers gas to petitioner and other retail distributors and industries. Alabama-Tennessee purchases its gas from Tennessee Gas Transmission Company. Petitioner owns and operates a gas distribution system, and all of its gas is purchased from Alabama-Tennessee.

On December 23, 1950, petitioner entered into a service agreement with Alabama-Tennessee for the sale and purchase of gas. New contracts have been executed from time to time to increase the quantity of gas petitioner was allowed to use, but the pricing provision (Appendix "C", *infra.*, pp. 26) remained the same. In March, 1954, new and increased rates were put into effect by agreement of the parties, but petitioner has not agreed to any subsequent rate changes.

The first two paragraphs of the pricing provision of the service agreement (R. 93) are similar to the provisions found in many service agreements, and which was considered by the court in *Memphis Light, Gas and Water Division v Federal Power Commission*, 358 US 103, 79 S Ct 194, 3 L Ed(2d) 153. The third paragraph, however, provides that Alabama-Tennessee "may file with the Federal Power Commission, or other body having jurisdiction, for a change in rates and charges effective as to Buyer, in accordance with the following subparagraphs." (R. 93-94) The sub-paragraph mentioned provides for an increase in the *commodity* where Alabama-Tennessee's *average* cost of gas exceeds the *average* price paid during the calendar year of the effective

date of the rate schedule, or when Alabama-Tennessee was required to pay certain additional taxes specified in the agreement.

On January 14, 1957, Alabama-Tennessee filed an application with the Federal Power Commission for an increase in both its demand and commodities rate to its customers, including petitioner. (R. 107-162) The application did not contain any data from which it could be determined whether there had been any increase in Alabama-Tennessee's average cost of gas over the average price paid during the calendar year of the effective date of the rate schedule, (1954), or whether it was required to pay any of the additional taxes mentioned in the contract. In fact, the application stated that the increase was to take care of increases Alabama-Tennessee *expected* to get from its supplier. (R. 114).

On February 13, 1957, the Commission ordered the question of the reasonableness of the rate be set for hearing pursuant to Section 4(e) of the Natural Gas Act, and suspended the increase for five months, or until July 14, 1957. (R. 189). On motion of Alabama-Tennessee (R. 192) the Commission entered an order on July 18, 1957, placing the rates into effect, without a hearing, subject to refund. (R. 197). This is the order in controversy. Within the statutory time petitioner filed an application for rehearing of the Commission's order, contending that it had a fixed rate contract, subject to the contract provision pertaining to increase in average cost of gas and additional taxes, and that the Commission had no jurisdiction to permit the rate increase. (R. 1-9, 207-211).

The Commission took no action on the challenge to its jurisdiction within the thirty days after it was filed, but on September 18, 1958, the Commission's secretary rejected petitioner's application for rehearing on the grounds that Corinth was not a party to the proceeding, and that the order was not a final order, but an interim order in the proceeding. (R. 212).

On petition to the United States Court of Appeals for the Fifth Circuit for review of the Commission's order allowing the increased rates to go into effect, the court rejected the contention of the Commission and Alabama-Tennessee that petitioner was not a "party to a proceeding . . . . aggrieved by an order issued by the Commission" under Section 19(b) of the Natural Gas Act. (R. 225) However, the court held that the order of the Commission was "interlocutory, procedural and ministerial" and that the court did not have jurisdiction to hear the petition for review until the grounds asserted by petitioner had been passed on by the Commission. The merits were not considered and the petition dismissed. (R. 225). No motion to dismiss the petition for review was made by the Commission or by Alabama-Tennessee.

It is the position of petitioner that it has a fixed price contract with Alabama-Tennessee, except under the specific conditions set out in the contract, and that the Federal Power Commission does not have jurisdiction to permit Alabama-Tennessee to increase its rates under the circumstances, and that when the Commission entered its order permitting the increased rates to go into effect, the petitioner was required to pay the increased rates, the order of the Commission was subject to review under Section 19(b) of the Natural Gas Act.

It is further the contention of petitioner that the order of the Commission imposed an obligation upon petitioner to pay the increased rates for an indeterminate period of time,[1] and that no further administrative action on the part of the Commission is required to put the increased rates into effect. Therefore, the order of the Commission is reviewable by the Court of Appeals.

REASONS FOR GRANTING WRIT

I.

THE OPINION OF THE COURT OF APPEALS IS IN DIRECT CONFLICT WITH THE DECISIONS OF THE COURT OF APPEALS FOR THE TENTH CIRCUIT ON THE SAME MATTER OF FEDERAL LAW.

The decision of the court below in the instant case holding that it did not have jurisdiction to decide this case is directly and irreconcilably in conflict with the decision of the United States Court of Appeals for the Tenth Circuit, in *Cities Service Gas Company v Federal Power Commission*, 10 Cir., 1958, 255 F 2d 850, cert. den., 358 US 837, 3 L Ed 2d 73. The cases of the Fifth Circuit and the Tenth Circuit involve identical questions of federal law under parallel circumstances, i.e., whether Section 19(b) of the Natural Gas Act confers jurisdiction upon a United States Court of Appeals to review such action of the Federal Power Commission with respect to the filing of increased gas rate schedules and permitted

[1] Petitioner has been paying an increased rate on a similar order in another case before the Commission (Docket G-5471) since December 15, 1954, and no hearing has been held or appears imminent.

The Tenth Circuit held that it did have such jurisdiction. to go into effect under Section 4 of the Natural Gas Act.

In *Cities Service Gas Company v Federal Power Commission*, supra, Magnolia Petroleum Company, supplier of natural gas to Cities Service Gas Company, tendered increased rate schedules to the Commission for filing, and were accepted and put into effect by the Commission. Cities Service sought review of this action of the Commission in the Circuit Court of Appeals for the Tenth Circuit. The respondent Commission answered that the acceptance of a rate schedule for filing was merely procedural and interlocutory and not subject to review. Magnolia contended that Cities Service had not exhausted the administrative remedies. The Court of Appeals held that it had jurisdiction to review the order of the Commission allowing the increased rate to be filed, and in so holding reviewed the rule announced in *Phillips Petroleum Company v Federal Power Commission*, 10 Cir., 1955, 227 F 2d 470, cert. den., *Michigan-Wisconsin Pipeline Company v Phillips Petroleum Company*, 350 US 1005, 76 S Ct 649, 100 L Ed 868, that "Section 19(b) of the Natural Gas Act does not by its terms limit the review of orders of the Commission to those that are final in form and substance"; and, to the rule announced in *Federal Power Commission v Metropolitan Edison Company*, 304 US 375, 58 S Ct 963, 82 L Ed 1408, that "the provisions for review thus relates to orders of a definitive character dealing with the merits of a proceeding before the Commission and resulting from a hearing upon evidence and supported by findings appropriate to the case." In commenting on these rules, the court said:

"Such language must be read in relation to the facts of the case and, so limited, does not establish an inflexible standard requiring a conventional hearing and resulting in findings supported by evidence as a condition to review. *Otherwise, the procedure for review could be successfully circumvented by a refusal to act upon a statutory granted right.* Pacific Power & Light Co. v. United States, 316 U. S. 407, 62 S. Ct. 1194, 86 L. Ed. 1563. The order of the agency is final for purposes of review when it imposes an obligation, denies a right, or fixes some legal relationship as a consummation of the administrative process, Isbrandtsen Co. v. United States, 93 U. S. App. D. C. 293, 211 F. 2d 51, certiorari denied Japan-Atlantic and Gulf Conference v. United States, 347 U. S. 990, 74 S. Ct. 852, 98 L. Ed. 1124 and cases cited therein. (Emphasis added)

"The present case is comparable to that considered by us in Phillips, supra, (227 F. 2d 475) wherein we stated:

"'The orders sought to be reviewed here do not deal with the merits of the proceedings before the Commission in the sense that they were entered upon evidence concerning the reasonableness of the rates. They do not purport to finally determine Phillips' wholesale rates. That matter is left to a conventional hearing in these proceedings. But the orders do purport to establish with finality the wholesale rates which Phillips was authorized to change Michigan on June 7, 1954 and thereafter until changed by order of the Commission pursuant to hearing.'"

* * * * * * * * *

"The question of whether or not petitioner has fully exhausted its administrative remedies is partially resolved by our determination that the order of the Commission was a final order and by peti-

tioner's efforts to have the order changed by its protest and petition for rehearing. Petitioner was not obligated to undertake the burden of persuading the Commission to take action to invalidate the rate as unreasonable or detrimental to the public interest in accordance with Section 5."

The instant case presents an identical situation. Alabama-Tennessee tendered for filing increased rate schedules which were accepted and put into effect by the Commission. Petitioner applied to the Commission for a rehearing of this order, contending that petitioner had a fixed rate contract with Alabama-Tennessee and that the Commission had no authority to permit the increased rate. The Commission did not act upon the application for rehearing within thirty days after it was filed, and therefore, the application was deemed to have been denied under Section 19(a) of the Natural Gas Act. Petitioner sought review of the Commission action in the United States Court of Appeals for the Fifth Circuit. The court dismissed the petition for review of the Commission action in the United States Court of Appeals for the Fifth Circuit. The court dismissed the petition for review, holding that the Commission's order permitting the rates to go into effect was "interlocutory, procedural, and ministerial" and that the grounds asserted by petitioner "should first be considered and passed on by the Commission." The court cited the reasons given in *Humble Oil & Refining Company v Federal Power Commission*, 5 Cir., 1956, 236 F 2d 819, cert. den. 352 US 967, 77 S Ct 354, 1 L Ed 2d 321 as the basis for its decision in the present case.

In *Humble Oil & Refining Company v Federal Power Commission*, supra, petitioner filed increased rate sched-

ules with the Commission, and following its usual procedure, the Commission suspended the increased rates for five months under Section 4(e) of the Natural Gas Act. On petition to Court of Appeals for the Fifth Circuit for review of the Commission's order the court held, in a 3-1 decision, that the order was not reviewable because "it is a mere procedural step taken at the inception of and not upon the completion of the administrative process." (236 F 2d 823). The court pointed out that the order "had but one objective in view, to maintain the status quo between seller and purchaser pending the exercise of the Commission's statutory jurisdiction to inquire into the reasonableness of the rate increases." (236 F 2d 823).

In this conflict of decisions a litigant is severely penalized if it cannot file its petition for review in the Circuit Court of Appeals for the Tenth Circuit where its case would be heard and decided, whereas, it would be denied access to the court for judicial review on identical facts in the Fifth Circuit. The petitioner herein is left in a position of being forced to submit to an order of the Commission believed to be illegal, or resorting to open defiance of the Commission order. The possibility of the latter situation prompted Judge Brown to state: "It is doubtful that government (administrators) should ever be permitted, in insulating their actions from judicial review, to assert that the citizen must run the bold course of defiance as a means of testing legality."

We respectfully submit that the conflict in decisions between the Fifth Circuit and Tenth Circuit should be resolved by this court.

II.

THE JUDGMENT OF THE COURT OF APPEALS IS PREDICATED UPON A MISCONSTRUCTION OF IMPORTANT QUESTIONS OF FEDERAL LAW IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT

The decision of the Court of Appeals constitutes an unwarranted expansion of the principals announced by this court in *United States v Los Angeles & S L Railroad Co.*, 273 US 299, 47 S Ct 413, 71 L Ed 651; *Columbia Broadcasting System, Inc. v United States*, 316 US 407, 62 S Ct 1194, 86 L Ed 1563; *Frozen Foods Express v United States*, 351 US 40, 76 S Ct 569, 100 L Ed 910; *United States v Storer Broadcasting Co.*, 351 US 192, 76 S Ct 763, 100 L Ed 1081 to the effect that when a determination by an administrative agency has an immediate and practical impact upon the subject of the action, the order of the agency is reviewable. The Fifth Circuit added the requirement that a hearing before the administrative agency is essential to give "finality" to the agency action or order.

The order of the Commission sought to be reviewed here has an immediate and practical impact upon petitioner, because the order requires petitioner to pay increased rates for gas from July 14, 1957, the effective date of the order. The Commission order does not "maintain the status quo between seller and purchaser pending the exercise of the Commission's statutory jurisdiction to inquire into the reasonableness of the rate increase."[2] If petitioner does not change its status and

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[2] *Humble Oil and Refining Company v Federal Power Commission*, supra.

pay the increased rates in accordance with the order, it is subject to the severe penalties prescribed by Section 21 of the Natural Gas Act. Petitioner contends that the Commission is without authority to permit the increased rates to go into effect because of petitioner's fixed rate contract with Alabama-Tennessee. Therefore, an inquiry into the reasonableness of the rates would not be material, and petitioner should not be forced to bear the burden of a hearing on the reasonableness of rates where the only matter under consideration was purely a question of law involving the construction of a contract. This precise point was placed squarely before the Commission in petitioner's application for rehearing before the Commission. The election not to have a hearing was that of the Commission.

The order of the Commission establishes with finality the new and increased rate which petitioner must pay for gas on July 14, 1957, and thereafter until changed by a subsequent order of the Commission. This can and often does amount to absolute finality.[3]

The Fifth Circuit Court of Appeals is inconsistent in its determination of what orders of the Commission are reviewable. In *Sun Oil Company v Federal Power Commission*, 5 Cir., 1959, 266 F 2d 222, Sun Oil Company (Sun) and Southern Natural Gas Company (Southern) had a contract for the purchase and sale of natural gas to remain in effect for ten years from September 3, 1947. Subsequent to the decision in the Phillips Petroleum case[4] on June 7, 1954, the Commission required Sun to

[3] See note 1, page 6, supra.
[4] *Phillips Petroleum Company v Wisconsin*, 347 US 672, 74 S Ct 794, 98 L Ed 1053.

obtain a certificate of public convenience and necessity authorizing the sale of natural gas to Southern. Sun also filed its contract as a rate schedule under Section 4 of the Natural Gas Act. Before the agreement between Sun and Southern expired in 1957, a new agreement was made which was to become effective upon the expiration of the 1947 agreement and provided for a considerable increase in the cost of gas. The contract was substantially the same as the 1947 agreement and provided for continued deliveries of gas from the same field and with the same facilities. Sun then applied to the Commission, under the new contract, for a new certificate of public convenience and necessity and filed its new contract as an initial rate schedule. The Commission rejected the application on the ground that the new certificate would merely duplicate the earlier certificate and that the proposed rate filings were rate changes rather than initial rate filings. Sun then resubmitted the 1957 contract as a rate change. The Commission then suspended the effectiveness of the rate change for the statutory period of five months. Petitioner Sun sought review of the action of the Commission and contended that the orders sought to be reviewed were interlocutory and that the administrative remedies had not been exhausted. In holding that the orders were reviewable, the court said:

> "We see no need for the holding of a formal hearing and the taking of testimony where no fact issue was presented. Although the orders before us are, in a sense, procedural and interlocutory, they make a final disposition of questions of grave importance in the natural gas industry. *The orders were formal determinations of rights of the petitioners, and the effect of the orders were not contingent upon future*

administrative action. We have no doubt that these orders should be passed upon by this court." (Emphasis added)

In the instant case the question presented to the Commission and to the court was the simple question of law whether Corinth had a fixed rate contract with Alabama-Tennessee and a formal hearing and taking of testimony would have added nothing, since no fact issue was presented. The order of the Commission was a formal determination of the right of the parties, i.e., that the Commission had authority to grant the rate increase, and the order permitted the increase to go into effect without any further administrative action. The order should have been reviewed by the court.

III.

THE JUDGMENT BELOW WILL CAUSE IRREPARABLE DAMAGE TO PETITIONER; DEPRIVES PETITIONER OF ITS PROPERTY WITHOUT DUE PROCESS; AND HAS AN INJURIOUS IMPACT ON THE GAS INDUSTRY.

The primary aim of the Natural Gas Act is to protect the consumer against exploitation at the hands of the natural gas companies.[5] Such protection is not afforded when a pipeline company (Alabama-Tennessee) can flagrantly violate its contractual obligation (a fixed rate contract) with the sanction and assistance of an administrative agency (F. P. C.), and the aggrieved party (petitioner) has no recourse to the courts for protection. In effect, petitioner is being forced, with the help of the

[5] *Federal Power Company v Hope Natural Gas Co.*, 64 S Ct 281, 320 US 591, 88 L Ed 333.

Commission, to lend large sums of money to Alabama-Tennessee by way of increased charges for gas. At the present time petitioner is being forced to pay increased rates in three[6] cases, all of which petitioner believes to be illegal.

Petitioner has no means of compelling the Commission to decide this all important jurisdictional question. If the lower court is correct in its theory that a hearing by the Commission is a prerequisite to judicial review, then petitioner is confronted with the dismal prospect of new rate increases from time to time, in violation of its contract, with no opportunity for the protection of judicial review of the action (or inaction) of the Commission.

If the Commission cannot make a decision over 4½ years in Docket G-5471, an indefinite period of time, if ever, may elapse before such a hearing, with the petitioner continuing to pay increased rates it believes to be illegal. This intolerable situation serves to deprive petitioner of its property without due process of law.

The Commission takes the position that if the increase is not allowed, petitioner will be entitled to a refund of the sums paid. This course does not restore to petitioner the residential space-heating and industrial customers that are lost to competitive fuels by the imposition of the unlawful increases.

There is a tendency today toward a lenient view of the laxity in administrative procedures, and the courts are hesitant to intervene until all administrative remedies have been exhausted. However, this modern tendency

[6]Docket G-5471, effective December 15, 1954; Docket G-11,982, effective July 15, 1957; Docket G-17,218, effective May 14, 1959.

should never become a shield for administrative tyranny. In the recent decision of *Iowa-Illinois Gas and Electric Co. v City of Ft. Dodge,* (Iowa, 1957) 85 NW 2d 28, Mr. Justice Larson stated the matter simply and eloquently:

> "* * * without doubt the law cannot be said to be static. It grows and changes. No court should be concerned with whether it is 'modern' but with whether it is right. There are such things as eternal virtues and ultimate truths, particularly in the field of constitutional law. The constitution guarantee against legislative confiscation and against the taking of private property without due process should and do mean the same in the year 1957 as they meant in the year 1909."

Undoubtedly there are many gas distribution systems with a fixed rate contract similar to that of petitioner, who are likewise suffering the penalty of administrative inaction, and who are denied relief through the courts.

CONCLUSION

Because of the direct conflict between courts of appeals on important matters of federal law, and because of a serious misapplication of principles of law by the court of appeals, and because of the serious and confiscatory effect on petitioner, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16956

CITY OF CORINTH, MISSISSIPPI,

PETITIONER,

versus

FEDERAL POWER COMMISSION,

RESPONDENT.

(June 29, 1959)

Before JONES, BROWN and WISDOM, Circuit Judges.

JONES, Circuit Judge: Alabama-Tennessee Natural Gas Company purchases natural gas from Tennessee Gas Transmission Company. Alabama-Tennessee operates a pipeline from which it delivers gas to industries and to retail distributors. Among the latter is the petitioner, the City of Corinth, Mississippi. A service agreement between Alabama-Tennessee and the City was executed un-

der the Federal Power Commission's Order No. 144, 18 C.F.R. Sec. 154.1 et seq. Among the provisions of the agreement were the following:

> "1. Rates to be paid for natural gas delivered hereunder are subject to the jurisdiction of the Federal Power Commission and shall be those contained in Rate Schedule G-1 on file with the Federal Power Commission and lawfully in effect from time to time pursuant to the provisions of the Natural Gas Act."
>
> "2. This agreement in all respects shall be and remain subject to the provisions of the applicable Rate Schedules and General Terms and Conditions attached to the rate schedules filed with the Federal Power Commission, all of which are by reference made a part hereof."

In January 1957 Alabama-Tennessee filed, pursuant to Section 4(d) of the Natural Gas Act, 15 U.S.C.A. Sec. 717c(d), an increase in the rates contained in its Rate Schedule G-1. The Commission requested comments on this filing from the customers of Alabama-Tennessee, including the City, on January 14, 1957. The City replied in a letter dated January 25, 1957, informally, protesting the rate increase on the grounds that it had not been shown to be reasonable and requested that the Commission suspend the increase and set the matter for hearing. On February 13, 1957, the Commission ordered the question of the reasonableness of Alabama-Tennessee's increased rate be set for hearing pursuant to Section 4(e) of the Act, 15 U.S.C.A. Sec. 717c(e), and suspended the increase for the maximum period of five months, or until July 14, 1957.

At the conclusion of the five-month suspension period,

Alabama-Tennessee moved to place the rate in effect subject to refund, pursuant to Section 4(e) of the Act. The Commission granted Alabama-Tennessee's motion by an order issued July 18, 1957. On August 19, 1957, the City attempted to file an application for rehearing of the Commission's order placing the increase rate in effect subject to refund, contending in its application that the Commission had no jurisdiction to accept the rate increase for filing. The Commission's Secretary rejected the application for rehearing on the ground that the City was not a party to the proceeding and not entitled to apply for rehearing. The Secretary's letter also stated that "the order to which your application is addressed is not a final order, but an interim order in this proceeding." The City has not at any time intervened in the proceedings before the Commission. It brings a petition for review seeking to have set aside the Commission's order placing the increased rates in effect subject to refund. Alabama-Tennessee has intervened. The City asserts that it has a fixed price contract and the Commission cannot authorize increases, founding its assertion upon the doctrine of *United Gas Pipe Line Co. v Mobile Gas Service Corp.*, 350 U. S. 332, 76 S. Ct. 373, 100 L. Ed. 373, *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U. S. 348, 76 S. Ct. 368, 100 L. Ed. 388, motion to amend opinion den. 351 U. S. 946, 76 S. Ct. 843, 100 L. Ed. 1471, and *Memphis Light, Gas and Water Division v. Federal Power Commission*, 102 App. D.C. 77, 250 F. 2d 402. The petition for review and briefs were filed prior to the decision of the Supreme Court in *United Gas Pipe Line Company v. Memphis Light, Gas and Water Division*, 358 U. S. 103, 79 S. Ct 194, 3 L. Ed. 2d 153, reh. den. 358 U. S. 942, 79 S. Ct. 344, 3 L. Ed. 2d 350.

The Commission and Alabama-Tennessee urge that the petition must be dismissed because the City of Corinth, not having intervened, is not a "party to a proceeding * * * aggrieved by an order issued by the Commission" under Section 19(b) of the Act, 15 U.S.C.A. Sec. 717r(b) and hence is not entitled to petition for review. The City insists that it is aggrieved and that the Commission has waived the necessity, if any there be, for formal intervention. No motion to dismiss the petition for review has been made upon this or upon any other ground. We do not think there is any jurisdictional necessity that we dismiss upon this ground sua sponte. Since the City was invited by the Commission to express its views we think it proper that we decline to say that it is not a party aggrieved.

The Commission contends and Alabama-Tennessee joins in urging that the order which the City asks us to review is interlocutory, procedural and ministerial and that the grounds here asserted should first be considered and passed upon by the Commission. We agree that this is so. We are without jurisdiction. The reasons have been adequately stated in earlier decisions and need not be here repeated. See *Humble Oil & Refining Co. v Federal Power Commission*, 5th Cir. 1956, 236 F. 2d 819, cert. den. 352 U. S. 967, 77 S. Ct. 354, 1 L. Ed. 2d 321.

The merits are not reached. The petition for review is

DISMISSED.

APPENDIX B

ORDER MAKING EFFECTIVE PROPOSED TARRIF CHANGES UPON FILING OF UNDERTAKING TO ASSURE REFUND OF EXCESS CHARGES.

(Issued July 18, 1957.)
United States of America.
Federal Power Commission.

Before Commissioners: Frederick Stueck, Acting Chairman; Seaborn L. Digby and William R. Connole.

In the Matter of:

Alabama-Tennessee Natural Gas Company.

Docket No. G-11982.

Alabama-Tennessee Natural Gas Company (Alabama-Tennessee), on January 14, 1957, tendered for filing Third Revised Sheet No. 5 and Second Revised Sheet No. 10 to its FPC Gas Tariff, First Revised Volume No. 1, proposed to become effective on February 14, 1957, and providing increased rates and charges for sales by Alabama-Tennessee in interstate commerce of natural gas for resale for ultimate public consumption, subject to the jurisdiction of the Commission.

Pursuant to the authority contained in Sections 4, 5, 15 and 16 of the Natural Gas Act, the Commission, by order issued February 13, 1957, entered upon a hearing concerning the lawfulness of the rates, charges, classifications and services of Alabama-Tennessee's FPC Gas

Tariff, First Revised Volume 1, as amended by the aforesaid revised tariff sheets, and pending such hearing and decision thereon, suspended and deferred the use of the proposed tariff changes until July 14, 1957, and until such further time thereafter as such changes might be made effective in the manner prescribed by the Natural Gas Act.

The proceeding instituted for the purpose of determining the lawfulness of the increased rates and charges embodied in the aforesaid proposed tariff changes filed on January 14, 1957, has not been concluded, nor a decision rendered therein.

Alabama-Tennessee, on July 1, 1957, in accordance with the provisions of the Natural Gas Act—particularly Section 4(e) thereof—filed in this proceeding a motion requesting that the aforesaid revised tariff sheets be made effective as of July 14, 1957.

The Commission finds:

It is appropriate and necessary in carrying out the provisions of the Natural Gas Act to require Alabama-Tennessee to file an undertaking as hereinafter ordered and conditioned.

The Commission orders:

(A) Upon execution by Alabama-Tennessee of the agreement and undertaking described in paragraph (C) below and acceptance thereof, evidenced by a letter addressed to Alabama-Tennessee by the Secretary of the Commission, the rates, charges, classifications, and serv-

ices set forth in Third Revised Sheet No. 5 and Second Revised Sheet No. 10 to Alabama-Tennessee's FPC Gas Tariff, First Revised Volume No. 1, shall be effective as of July 14, 1957, subject to further orders of the Commission in this proceeding.

(B) Alabama-Tennessee shall refund at such times and in such amounts to persons entitled thereto, and in such manner as may be required by final order of the Commission, the portion of the increased rates and charges found by the Commission in this proceeding not justified, together with interest thereon at the rate of 6 per cent per annum from the date of payment to Alabama-Tennessee until refunded; shall bear all costs of any such refunding; shall keep accurate accounts in detail of all amounts received by reason of the increased rates or charges effective as of July 14, 1957, for each billing period, specifying by whom and in whose behalf such amounts were paid; and shall report (original and four copies), in writing and under oath, to the Commission monthly, for each billing period, and for each purchaser, the billing determinants of natural gas sales to such purchasers and the revenues resulting therefrom as computed under the rates in effect immediately prior to July 14, 1957, and under rates and charges allowed by this order to become effective, together with the differences in the revenues so computed.

(C) As a condition of this order, within 15 days from the date of issuance hereof, Alabama-Tennessee shall execute and file with the Secretary of this Commission its written agreement and undertaking to comply with the terms of paragraph (B) hereof, signed by a responsible officer of the corporation, evidenced by proper au-

thority from the Board of Directors, and accompanied by a certificate showing service of copies thereof upon all purchasers under the rate schedules involved, as follows:

Agreement and Undertaking of Alabama-Tennessee Natural Gas Company to Comply with the Terms and Conditions of Paragraph (B) of Federal Power Commission's Order Making Effective Proposed Tariff Changes.

In conformity with the the requirements of the order issued ....., 1957, in Docket No. G-11982, Alabama-Tennessee Natural Gas Company hereby agrees and undertakes to comply with the terms and conditions of paragraph (B) of said order, and has caused this agreement and undertaking to be executed and sealed in its name by its officers, thereupon duly authorized in accordance with the terms of the resolution of its Board of Directors, a certified copy of which is appended hereto this .....day of. ....., 1957.

ALABAMA-TENNESSEE NATURAL GAS COMPANY,

By.....

Attest:

.....

Secretary.

(D) If Alabama-Tennessee shall, in conformity with the terms and conditions of paragraph (B) of this order, make the refunds as may be required by order of the

Commission, the undertaking shall be discharged, otherwise it shall remain in full force and effect.

By the Commission.

J. H. GUTRIDE,
(Joseph H. Gutride),
Secretary.

APPENDIX C

ARTICLE V

Prices and Rate Schedules

1. The rates to be paid for natural gas delivered hereunder are subject to the jurisdiction of the Federal Power Commission and shall be those contained in Rate Schedule *G*-1 on file with the Federal Power Commission and lawfully in effect from time to time pursuant to the provisions of the Natural Gas Act.

2. This agreement in all respects shall be and remain subject to the provisions of the applicable Rate Schedules and General Terms and Conditions attached to the rate schedules filed with the Federal Power Commission, all of which are by reference made a part hereof.

3. Seller may file with the Federal Power Commission, or other body having jurisdiction, for a change in the rates and charges effective as to Buyer, in accordance with the following sub-paragraphs; provided, however, that should it hereafter become unnecessary for Seller so to file, Seller shall have the right to increase the rates and charges effective as to Buyer to provide that:

(a) One-half cent increase or decrease, as the case may be, in the commodity charge for each full one-half cent per MCF that the average cost of gas purchased by Seller shall exceed or shall be less than the average purchase price paid by Seller for gas during the calendar year of the effective date of the Rate Schedule specified in Section 1 of this Article V.

(b) Adjustment of the commodity charge in an amount equal to the amount of any present or future sales tax levied by the United States, or by the States of Alabama, Mississippi or Tennessee, or any political subdivision thereof, on, or in respect of, applicable to, or measured by deliveries of natural gas hereunder to Buyer, if and to the extent any such sales tax shall be actually paid by Seller and in an amount equal to three-fourths of any additional tax, (as additional tax is defined in the next sentence hereof) which Seller shall be required to pay. The term "additional tax" shall mean collectively any sales, transaction, occupation, service, production, severance, gathering, transmission, export excise tax, assessment, fee, or other exaction hereafter levied, assessed or fixed by the United States or any state or other governmental authority, and any tax, assessment, exaction, or fee of similar nature or equivalent in effect (not including income, excess profits, capital stock, franchise, or general property taxes, or any sales taxes levied on, in respect of, applicable to, or measured by sales of natural gas under this contract) in addition to or greater than those, if any being levied, assessed or fixed at the date of this contract on, measured by, in respect of or applicable to the natural gas to be delivered by Seller to Buyer under this contract, and which Seller may be liable for during any month either directly or indirectly through any obligation of Seller to reimburse others.

APPENDIX D

RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES

Section 4.(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with

all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period

than five months beyond the time when it would otherwise go into effect: *Provided,* That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. (52 Stat. 822 (1938); 15 U. S. C. Sec. 717c)

REHEARING; COURT REVIEW OF ORDERS

Sec. 19(a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of

was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which it supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347.)

(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's

order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commissioner's order. (52 Stat. 831 (1938); 15 U. S. C. Sec. 717r)

GENERAL PENALTIES

Sec. 21 (a) Any person who wilfully and knowingly does or causes or suffers to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or who wilfully and knowingly omits or fails to do any act, matter, or thing in this act required to be done, or wilfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished by a fine of not more than $5,000 or by imprisonment for not more than two years, or both.

(b) Any person who wilfully and knowingly violates any rule, regulation, restriction, condition, or order made or imposed by the Commission under authority of this act, shall, in addition to any other penalties provided by law, be punished upon conviction thereof by a fine of not exceeding $500 for each and every day during which such offense occurs. (52 Stat. 833 (1938); 15 U. S. C. Sec. 717t)

APPENDIX E

JUDGMENT

Extract from the Minutes of June 29, 1959

CITY OF CORINTH, MISSISSIPPI

No. 16956 versus

FEDERAL POWER COMMISSION

This cause came on to be heard on the petition of City of Corinth, Mississippi, for review of an order of the Federal Power Commission issued on July 18, 1957 in Docket No. G-11982, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered, adjudged and decreed by this Court that the petition for review in this cause be, and it is hereby, Dismissed.

FILE COPY

Office Supreme Court, U.S.
FILED
OCT 21 1959
JAMES R. BROWNING, Clerk

No. 431

In the Supreme Court of the United States

OCTOBER TERM, 1959

CITY OF CORINTH, MISSISSIPPI, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (Pet. App. A, pp. 17–20) is reported at 268 F. 2d 10. The unreported Federal Power Commission order appears at R. 197–201 and is set out in Appendix B to the petition at pages 21–25.

JURISDICTION

The judgment of the Court of Appeals was entered on June 29, 1959 (Pet. App. E, p. 34). The petition for a writ of certiorari was filed on September 25, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Does a court of appeals, on petition to review an interlocutory order of the Federal Power Commission allowing a pipeline rate increase to go into effect subject to refund, have jurisdiction to decide whether the pipeline's contract with a customer permits the filing of such unilateral rate change, where the Commission has not yet interpreted the contract upon which its authority to grant the increase depends?[1]

STATUTE INVOLVED

Sections 4 and 19(b) of the Natural Gas Act (15 U.S.C. 717r(b)) are set forth in Appendix D of the petition at pages 28–32.

STATEMENT

Petitioner, a municipality engaged in the local distribution of natural gas, is served by Alabama-Tennessee Natural Gas Company, a Commission-regulated interstate pipeline. Alabama-Tennessee sells gas under the usual filed-tariff arrangement, which includes both general rate schedules and service-agreements with particular customers. The service-agreement with petitioner appears at R. 7.

In January 1957, Alabama-Tennessee filed, pursuant to Section 4(d) of the Natural Gas Act (15 U.S.C. 717c(d)), an increase in the rates applicable to petitioner (R. 107–163). The Commission

[1] Should certiorari be granted, we reserve the right also to argue, as we did below, that petitioner is not a "party" entitled to review under Section 19 of the Natural Gas Act because of its failure to intervene in the rate proceeding prior to applying to the Commission for rehearing.

promptly requested petitioner's comments on the filing, pursuant to Section 154.27 of its Regulations, 18 CFR 154.27 (R. 165–167). Petitioner replied by letter protesting the rate increase on the grounds that it had not been shown to be reasonable, and requesting that the Commission suspend the increase and set the matter for hearing (R. 186–188). On February 13, 1957, the Commission did order the increased rate to be set for hearing pursuant to Section 4(e) of the Act (15 U.S.C. 717c(e)), and suspended it for the maximum period of five months (R. 189–192).

At the conclusion of the five-month suspension period, Alabama-Tennessee moved to place the rate in effect subject to refund, as provided by Section 4(e) of the Act (R. 192). Under that section, the Commission on July 18, 1957, permitted the increased rate to go into effect subject to refund, and also imposed provisions to assure payment of any refunds that might become due (R. 197–201).

Petitioner did not follow its informal protest, which requested that the rate be set for hearing, with a formal attempt to intervene in the Commission proceedings.[2] Instead, petitioner, on August 19, 1957, attempted to file an application for rehearing of the July 18 order, contending for the first time that the

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[2] The Commission's Regulations provide for informal protests which are "given such consideration as their contents and nature warrant." 18 CFR 1.40(b)(1). Petitioner's letter appearing at R. 186–188 was such a protest, merely advising the Commission in the exercise of its summary power to suspend rate changes. The same regulation points to the additional procedure necessary in order to intervene in a case. 18 CFR 1.10(d); see also 18 CFR 1.1(f) (13) and (14).

Commission lacked authority to accept the increased rate for filing (R. 207-211). The Commission's Secretary rejected the application for rehearing on the grounds that petitioner was not a party to the proceeding and that the challenged order was interlocutory, so that petitioner was not entitled to apply for rehearing under the Act and the Regulations (R. 212).

The Court of Appeals held that the Commission's order placing the increase in effect subject to refund was "interlocutory, procedural and ministerial and that the grounds * * * asserted should first be considered and passed upon by the Commission." 268 F. 2d 10, 12 (Pet. App. 20).

ARGUMENT

The petition presents no question which calls for consideration by this Court. The Court of Appeals was correct in adhering to the elementary principle that a court will not undertake interlocutory review of a question upon which the administrative agency has not yet passed. *Federal Power Commission* v. *Arkansas P. & L. Co.*, 330 U.S. 802.

The order here complained of is not "of a definitive character dealing with the merits of a proceeding". *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U.S. 375, 384. It does not determine whether the Federal Power Commission has authority to grant Alabama-Tennessee a rate increase.[3] The question of

[3] Petitioner's contention to the contrary (Pet. 14) is mistaken. Not only is the order complained of silent as to issue of authority to act upon the filing, but petitioner failed to raise that question until the order had already issued.

Commission power over the subject matter may always be raised before the Commission and is regularly decided in numerous proceedings. Here, that determination will turn upon a contract interpretation (of the service-agreement between Alabama-Tennessee and petitioner) which is "peculiarly within the area of the Commission's special competence". *United Gas Pipe Line Co.* v. *Memphis Gas Div.*, 358 U.S. 103, 114.

The claimed conflict between circuits (Pet. 6–10) does not exist. The challenged order represents a preliminary stage of a rate proceeding which will culminate in a final, reviewable, order. The order held reviewable in *Cities Service Gas Company* v. *Federal Power Commission*, 255 F. 2d 860 (C.A. 10), certiorari denied *sub nom. Magnolia Petroleum Company* v. *Cities Service*, 358 U.S. 837, permitted the filing of a non-suspendible rate, there being neither provision for subsequent hearing nor any refund undertaking.[4] The order permitting filing concluded that matter; in this case, on the other hand, the order merely constitutes an early step in a pending proceeding which will continue.

Even an interlocutory order may be reviewable as to questions which the Commission has determined. See *Memphis Light, G. & W. Div.* v. *Federal Power Commission*, 250 F. 2d 402 (C.A.D.C.), reversed on other grounds *sub nom. United Gas Pipe Line Com-*

[4] *Cities Service* involved a first filing (made pursuant to the Commission's 174 Series orders implementing Section 4(e), following *Phillips Petroleum Company* v. *Wisconsin*, 347 U.S. 672), not, as here, a suspendible rate change filed under 4(d), to be followed by a rate hearing and determination.

pany v. *Memphis Gas Div.*, 358 U.S. 103.[5] But the Court of Appeals here properly refused to usurp the Commission's function of initially determining its own jurisdiction.[6]

[5] Thus, the rate suspension order in *Phillips Petroleum Company* v. *Federal Power Commission*, 227 F. 2d 470 (C.A. 10), certiorari denied *sub nom. Michigan Wisconsin Pipe Line Company* v. *Phillips*, 350 U.S. 1005, was held reviewable because it not only suspended a rate change but also fixed the rate for June 7, 1954 (the date of this Court's *Phillips* decision which the Commission took as the beginning of its regulation of independent producers).

And *Sun Oil Company* v. *Federal Power Commission*, 266 F. 2d 222 (C.A. 5), petition for writ of certiorari pending, No. 321, October Term, 1959, also involved review of determinations the Commission had in fact made. Sun sought review of two Commission actions, raising identical questions as to each. Sun rendered a certificated service; its gas sales contract had expired. The Commission's first action rejected an attempted filing of a new contract as an initial rate, and did pass upon the questions later raised on review. The second action suspended and set for hearing that same contract when subsequently filed as a rate change. In the Court of Appeals, the Commission argued prematurity as to both actions, but on different grounds. It is not clear whether the Fifth Circuit rejected that argument as to the suspension order as well as the previous action rejecting the attempted filing. We assume that the fact that the Commission had passed on the issues in *Sun* (at least in its first action) explains that holding. Both *Sun* and the opinion below were written by the same judge. In any event, an intra-circuit conflict is not ground for review by this Court. *Wisniewski* v. *United States*, 353 U.S. 901.

Neither *Cities Service* nor *Phillips* nor *Sun* presented a question of interpreting a service-agreement in order to determine the Commission's jurisdiction to grant a rate increase under Section 4.

[6] *Columbia Broadcasting System* v. *United States*, 316 U.S. 407, *Frozen Food Express* v. *United States*, 351 U.S. 40, and *United States* v. *Storer Broadcasting Company*, 351 U.S. 192, all involved judicial review of administrative orders made after full hearing as to questions which the agency had considered.

[Footnote continued]

The orderly way of raising petitioner's contention (and a course commonly followed) is formal intervention in the rate proceeding [7] to obtain dismissal of the filing. That would be a means of compelling the Commission to determine, either by a separate proceeding [8] or at the time the reasonableness of the rates is determined,[9] whether it has authority to grant the

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The prematurity issue involved in those cases related to the policy of conserving judicial attention for immediate and pressing controversies. The issue here, however, relates to the policy of protecting the integrity of the administrative process.

[7] After rejection of its application for rehearing, petitioner did file a notice of intervention and, as a party, will be entitled to participate in the proceedings.

[8] Where appropriate, the Commission has set jurisdictional issues for separate decision. See, *e.g.*, *Phillips Petroleum Company* v. *Wisconsin*, 347 U.S. 672. The Commission's power summarily to reject a Section 4 rate filing is narrowly circumscribed. See *Mississippi River Fuel Corporation* v. *Federal Power Commission*, 202 F. 2d 899 (C.A. 3).

[9] Petitioner refers (Pet. 6, Note 1) to the duration of its payments of a previous Alabama-Tennessee rate increase subject to refund in a proceeding (Docket G-5471) in which it says no hearing has yet been held or appears imminent. Consideration of that increase necessarily awaited completion of another Commission proceeding (Docket G-5259) on the increase in the rate Alabama-Tennessee has to pay its sole supplier, Tennessee Gas Transmission Company, which Alabama-Tennessee sought to pass on to its customers. G-5259 was completed February 6, 1958, by Commission approval of refunds to be made to Alabama-Tennessee, among others. Petitioner had not intervened in G-5471 until December 9, 1957. The staff investigation of Alabama-Tennessee's rates, temporarily halted during the pendency of *United Gas Pipe Line Company* v. *Memphis Gas Co.*, 358 U.S. 103, in this Court, was resumed and completed this year. A proposal for settlement of the instant rate case submitted by Alabama-Tennessee and all of its customers, save petitioner, will be the subject of a conference of all parties with the Commission staff, which has been set for a date in November. The

rate increase. Interpretation of the service-agreement may require the taking of evidence; but in any event such procedure will permit Alabama-Tennessee and the Commission's staff to meet and analyze petitioner's contentions before the regulatory forum chosen by Congress.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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Assistant Attorney General.
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Federal Power Commission.
OCTOBER 1959.

G-5471 rate will also be considered then, and, failing agreement on a settlement, will go to hearing.

U.S. GOVERNMENT PRINTING OFFICE 1959

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 431

CITY OF CORINTH, MISSISSIPPI, *Petitioner*,

v.

FEDERAL POWER COMMISSION, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR INTERVENOR, ALABAMA-TENNESSEE NATURAL GAS COMPANY, IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit dismissing the petition for review is reported at 268 F. 2d 10 and is printed in the appendix to the petition for a writ of certiorari (App. pp. 17-20).[1] The Federal Power Commission's order is not reported but is printed in the petition (App. pp. 21-25).

[1] This and other appendix ("App.") references are to the appendix to the petition for a writ of certiorari.

JURISDICTION

The judgment of the Court of Appeals was entered on June 29, 1959 (App. p. 34). The petition for a writ of certiorari was filed on September 25, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

Whether the Court below properly held that it had no jurisdiction to review an order of the Federal Power Commission, which order the Court determined to be interlocutory, procedural and ministerial, since the only legal effect of such order was to require the return to a pipeline's customers of any portion of proposed increased rates determined by the Federal Power Commission to be excessive.

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act of 1938, 52 Stat. 821, 15 U.S.C. 717, *et seq.*, are set forth in the appendix to the petition (pp. 28-33). However, there are errors in the provisions of the Act as appearing in the petition, so they are printed correctly as an appendix to this brief.

STATEMENT

The Petitioner, City of Corinth, Mississippi (Corinth) seeks review of a decision of the Court of Appeals for the Fifth Circuit dismissing Corinth's petition to review and set aside an order of the Federal Power Commission (Commission). Such order of the Commission was entered on July 18, 1957 in a proceeding arising out of a rate filing by this intervenor,

Alabama-Tennessee Natural Gas Company (Alabama-Tennessee), with the Commission designed to increase its rates to compensate it for increases in its supplier's rates. The Commission suspended by order of February 13, 1957 the effectiveness of the increased rates until July 14, 1957 on which latter date they became effective upon motion filed in accordance with Section 4(e) of the Act.

Since the increased rates became effective as a matter of right upon motion at the end of the suspension period, the only purpose of the July 18th order and its total effect, as later explained more fully, was simply to require Alabama-Tennessee to assure the Commission and its resale customers that it would refund with interest any amounts collected through the increased rates which the Commission might determine after a hearing to be excessive.

The Court of Appeals found that the Commission's order was interlocutory, procedural and ministerial and that the grounds asserted by Corinth should first be considered and passed upon by the Commission. Accordingly, the Court below held that it had no jurisdiction stating that "the merits are not reached" and dismissed the petition for review.

Alabama-Tennessee owns and operates a natural gas pipeline system extending in a southeasterly direction from a point of connection in McNairy County, Tennessee, with the pipeline system of its sole supplier of natural gas, Tennessee Gas Transmission Company (Tennessee Gas), for a distance of approximately 140 miles through the northeastern corner of the State of Mississippi into the northern part of Alabama and terminating at the City of Huntsville, Alabama.

Through this pipeline system Alabama-Tennessee sells natural gas directly to industries for their own consumption and to various distributors who resell the gas at retail in their respective communities in the States of Tennessee, Mississippi, and Alabama. Corinth is one of Alabama-Tennessee's 14 resale distribution customers, the sale of gas to which is subject to the jurisdiction of the Commission. Corinth owns and operates the distribution system within the City. Because of its transportation and sale of natural gas in interstate commerce for resale, Alabama-Tennessee is a "natural-gas company" within the meaning of the Natural Gas Act and is subject to the jurisdiction of the Commission.

Alabama-Tennessee is a relatively new pipeline having first commenced operations in 1950. Its facilities were constructed and are operated pursuant to a certificate of public convenience and necessity issued by the Commission (7 F.P.C. 251, 257). As a condition of this certificate, Alabama-Tennessee was required to obtain Commission approval of its initial tariff and rates which it did (9 F.P.C. 849, 11 F.P.C. 75). Throughout the entire period of its operations Alabama-Tennessee has operated on a Commission-approved tariff of the type involved in the *Memphis* case[2] rather than individually-negotiated contracts. Pursuant to Commission authorizations the rates have been changed from time to time but the tariff has otherwise continued in effect without material revision. Similarly, Alabama-Tennessee's service agreements, although re-executed from time to time to provide for increased deliveries of gas, have not been changed in any other substantial respect.

[2] *United Gas Pipe Line Co. v. Memphis Light, Gas and Water Division*, 358 U.S. 103 (1958).

The changes in rates from time to time have been required primarily to compensate Alabama-Tennessee for increases in its cost of purchased gas from its supplier, Tennessee Gas. On January 14, 1957 Tennessee Gas filed with the Commission for a further increase in its rates and Alabama-Tennessee, on the same day, filed its increased rates designed to pass on to its customers the increase sought by Tennessee Gas.

In response to the Commission's solicitation of the customers' views on Alabama-Tennessee's increased rates, Corinth requested that such rates be suspended and a hearing held to determine whether the rate increase was justified. This request was in conformity with the City's action in similar instances in the past. By order of February 13, 1957 the Commission took such action as requested by Corinth and others. It ordered a hearing for the purpose of determining the reasonableness of the rates and suspended their effectiveness until July 14, 1957—the maximum five-month period allowed under Section 4(e) of the Act.

Upon the expiration of the suspension period Alabama-Tennessee filed a motion pursuant to Section 4(e) of the Act to make the rates effective as of July 14, 1957. On July 18, 1957 the Commission entered its above-described order which was the subject of the proceedings in the Court below. Without first having attempted to become a party to the Commission's proceedings, Corinth filed on August 19, 1957 an application for rehearing of the July 18th order.

By letter of September 18, 1957 the Secretary of the Commission rejected and returned Corinth's application for rehearing stating that Corinth "is not a party to this proceeding and the order to which your application is addressed is not a final order but an interim

order in this proceeding" (R. 212). Consequently, the Commission has never had an opportunity to consider and pass upon the questions which Corinth sought to have reviewed by the Court below.[3] It is our position that the Court properly dismissed Corinth's petition for review.

ARGUMENT

The decision of the Court below was clearly correct, for the Commission's order was, as the Court held, "interlocutory, procedural and ministerial" and as a consequence, Corinth cannot by any stretch of the imagination be considered to be aggrieved by the order.[4] On the contrary, the Commission's order is for the specific benefit and protection of Corinth and the other resale customers of Alabama-Tennessee. We will also show that there is no conflict between the decision below of the Fifth Circuit Court of Appeals and decisions of the Tenth Circuit, as contended by petitioner. The rights of no one are determined finally by either the Commission's order or the Court's decision dismissing the petition for a review thereof.

I. The Decision Below Is Clearly Correct

Under Section 4(e) of the Act the Commission is authorized to enter upon a hearing concerning the

[3] All other resale customers have agreed to a settlement of the proceedings which settlement agreement is pending before the Commission.

[4] Alabama-Tennessee and the Commission both contended below that Corinth did not have sufficient standing to attack the Commission's order since it was not a "party to a proceeding" under the Act "aggrieved by an order issued by the Commission in such proceeding"—conditions precedent to maintaining a review proceeding under Section 19(b) of the Act.

lawfulness of any new rate filing proposing a change in an existing rate or charge. Pending such hearing and decision thereon the Commission may suspend the effectiveness of the new filing "but not for a longer period than five months beyond the time it would otherwise go into effect."

In the event that the Commission decides to suspend a new filing and it has not made a determination thereon at the expiration of the period of suspension then "on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service *shall* go into effect" (Emphasis supplied). Upon the filing of such a motion to make new rate schedules effective, the Commission is given the discretionary power by Section 4(e) to "require the natural-gas company to furnish a bond, to be approved by the Commission."

The Commission's order of July 18, 1957 which petitioner sought to have reviewed determined no one's rights or any of the issues in the proceedings which had previously been instituted by the Commission concerning the new rate filing. Although entitled "Order Making Effective Proposed Tariff Changes upon Filing of Undertaking to Assure Refund of Excess Charges" the total effect legally of the order was to require the submission by Alabama-Tennessee of a written undertaking to make refund of any amounts ordered by the Commission after a hearing. Clearly this was for the benefit of Corinth and all other jurisdictional customers.

It was not the July 18th order which made the new rate filing effective as of July 14, 1957. Upon the filing by Alabama-Tennessee of its motion, the new filing

automatically became effective by operation of the statute, and this would have been so irrespective of whether the Commission took any action with respect to the motion. Whether the Commission would require a bond or other assurance of the pipeline to make refunds was a matter lying wholly within the Commission's discretion.

The Commission has construed the language of Section 4(e) in such a manner as to leave no doubt that a natural gas company has an absolute right upon motion to make increased rates effective upon the expiration of the suspension period. In *El Paso Natural Gas Co.*, 18 F.P.C. 838, 839, the Commission held, in an order permitting rates to become effective under bond, as follows:

> "Under the statute, the effectiveness of the proposed change is made a matter of right and not a matter committed to permissive or discretionary Commission action. The purpose of the present order, accordingly, is (a) to insure the carrying out of this statutory requirement that each increased rate so made effective after suspension shall be subject to refund if, and to the extent that, the Commission later finds such rate unlawful; and (b) to give notice of the effectiveness of the increased rate, subject to refund."[5]

[5] This same statutory interpretation has been adhered to by the Commission in the following cases: *United Gas Pipe Line Company*, Docket No. G-12801 (January 20, 1958) 19 F.P.C. 119, 120; *Texas Eastern Transmission Corporation*, Docket No. G-12706 (February 3, 1958); *Texas Gas Transmission Corporation*, Docket No. G-12823 (March 27, 1958); *Colorado Interstate Gas Company*, Docket No. G-13541 (April 28, 1958); *Pacific Northwest Pipeline Corporation*, Docket No. G-13202 (April 28, 1958); *Algonquin Gas Transmission Company*, Docket No. G-12859, 19 F.P.C. 668; *Panhandle Eastern Pipe Line Company*, Docket No. G-14755 (September 9, 1958). See also: *Atlantic Seaboard Corp. v. Federal Power*

It is therefore apparent that the order complained of by Corinth was as the Court characterized it "interlocutory, procedural and ministerial." To require the Court below to accept jurisdiction to review the Commission's order of July 18, 1957 would be to impose upon the Court the necessity of making determinations on factual and legal matters concerning Alabama-Tennessee's new rate filing which the Natural Gas Act clearly contemplates should be passed upon by the Commission in the first instance. For example, the petitioner argues that it has a fixed rate contract. Such a matter is one, as stated in *Memphis* (358 U.S. 103, 114), "which involves matters peculiarly within the area of the Commission's special competence."

II. There Is No Conflict of Decisions

Petitioner contends that there is an irreconcilable conflict between the decision of the Court below and that of the Court of Appeals for the Tenth Circuit in *Cities Service Gas Company* v. *Federal Power Commission*, 255 F. 2d 860;[6] *cert. den.*, 358 U.S. 837, which

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Commission (CA-4, 1953), 201 F. 2d 568, 573; *Mississippi River Fuel Corp.* v. *Federal Power Commission* (CA-3, 1953), 202 F. 2d 899, 902.

Moreover, by Order No. 215 issued October 9, 1959 the Commission has promulgated a general rule applicable to suspensions of increased rates of independent producers whereby there is eliminated the necessity for the Commission to enter individual orders requiring the independent producer to provide a bond or agreement assuring the refund of any amounts determined by the Commission to be excessive. Under this new rule the rates become effective at the expiration of the suspension period upon the filing by the independent producer of a motion in conformity with Section 4(e) of the Act, together with a bond or other assurance by the producer that such refunds will be made as are required by the Commission.

[6] The excerpt at page 8 of the petition from this decision is not accurate.

latter decision relied, in part, on the same Court's decision in *Phillips Petroleum Company* v. *Federal Power Commission*, 227 F. 2d 470; *cert. den.*, 350 U.S. 1005.

There is definitely no conflict between these decisions. In the first place, neither the *Cities Service* nor the *Phillips* case even involved natural gas pipeline company rate filings under Section 4 of the Act. Both concerned determinations of the effective rate of the producers on June 7, 1954, the date of the Supreme Court's decision in *Phillips Petroleum Company* v. *State of Wisconsin*, 347 U.S. 672.

In the *Cities Service* case, Magnolia Petroleum Company filed with the Commission as a rate schedule its contract for the sale of natural gas to Cities Service, as required by the Commission's rules promulgated after the *Phillips* decision of the Supreme Court. This agreement provided for a base price of six cents per Mcf but orders of the Kansas Corporation Commission provided for an eleven-cent minimum price. Such orders were included as a part of Magnolia's rate filing. Magnolia contended that the eleven-cent price was effective as of June 7, 1954 and thereafter. Cities Service, on the other hand, was challenging through separate litigation in the State Court the validity of the minimum price order and urged the Commission to reject the filing.

By order of March 21, 1957, as modified May 17, 1957, the Commission accepted Magnolia's rate filing and thereby determined the price as of June 7, 1954 to be eleven cents. Despite the Supreme Court's decision after the filing had been made declaring that the Kansas Corporation Commission was without authority to fix the price of the gas sold by Magnolia to Cities Service, the Commission took the position that the ac-

ceptance of a rate schedule for filing is not a determination by the Commission as to the validity or reasonableness of the rate and that the order complained of was merely procedural and interlocutory and not subject to review. The Commission conceded that Cities Service should recover any excess payments in a proper action but contended that the Kansas order had been but a nullity in the filing and could not be a basis for relief to Cities Service. In other words, the Commission recognized the validity of Cities Service' claims of injury and its need for relief but contended that such relief must be obtained in some other manner.

The Court in that case rejected the Commission's views specifically on the ground that the Commission's order accepting the eleven-cent rate was the source of Cities Service' aggrievement. The Court stated (255 F. 2d at 863):

> "Petitioner has been compelled to pay eleven cents for its gas, and wrongfully so, because the Commission's acceptance of the rate schedule was pro forma the acceptance of the rate then being paid. To assert that petitioner's aggrievement lay with the invalid Kansas Corporation Commission order and not with the Power Commission's acceptance of Schedule 26 [the Kansas Corporation Commission order] is but to play with words. Petitioner was twice aggrieved and has properly and consistently pursued separate remedies. And, since petitioner's complaint lies in the action of the Power Commission in accepting a rate schedule which was not the effective rate on the critical date, petitioner could not and need not pursue an administrative remedy under Section 5 of the Natural Gas Act to show that the accepted rate was unjust and unreasonable."

That situation is far different from the one facing Corinth. By contrast, no rights of Corinth or anyone else were determined by the order which it seeks to have reviewed. Any entitlement which it may have to relief from the rates of which it complains can only be afforded it in the pending proceedings before the Commission which were instituted in the manner which Corinth had requested.

The *Phillips* decision (227 F. 2d 470) involves a highly complicated assortment of problems stemming from the Commission's assertion of jurisdiction over Phillips as a result of the Supreme Court's decision. But as in the *Cities Service* case, the orders involved purported "to establish with finality the wholesale rates which Phillips was authorized to charge Michigan [Wisconsin Pipe Line Company] on June 7, 1954 and thereafter until changed by order of the Commission pursuant to hearing" (227 F. 2d at 475). Again in contrast to the situation here, the orders had a finality which does not exist in the Alabama-Tennessee order.

It is apparent therefore that the Tenth Circuit Court of Appeals' decisions are readily distinguishable from the decision of the Court below in that the decisions involve highly dissimilar factual settings and entirely different legal questions.

III. There Is No Important Question of Federal Law

As Corinth states in its petition (p. 12) the very narrow question involved here is "purely a question of law involving the construction of a contract." This question is later referred to (p. 14) as a "simple question of law." Accordingly, there is not here presented any matter sufficiently significant for the consideration of the Supreme Court.

With respect to whether Corinth's agreement provides as it contends for a "fixed rate" not subject to change (Pet. pp. 4, 5, 9, 12, 14, 15) or for a "going rate" subject to change as a result of filings under Section 4 of the Act, this matter was disposed of in this Court's recent decision in the *Memphis* case (358 U.S. 103). The contract language there considered by the Court in the light of the provisions of Section 4 of the Act is, as Corinth acknowledges (Pet. p. 3), strikingly similar to that in the Corinth agreement.[7]

The only possible question of Federal law which could have any application to the circumstances here was settled by the Supreme Court in the *Memphis* case decided only a few months ago.

[7] The pertinent language in the agreements involved in *Memphis* and in this case are as follows:

Memphis (358 U.S. at 105).

"All gas delivered hereunder shall be paid for by Buyer under Seller's Rate Schedule [the appropriate rate schedule designation is inserted here], *or any effective superseding rate schedules*, on file with the Federal Power Commission. This agreement in all respects shall be subject to the applicable provisions of such rate schedules and to the General Terms and Conditions attached thereto and filed with the Federal Power Commission which are by reference made a part hereof."

Corinth (App. p. 26)

"ARTICLE V

"Prices and Rate Schedules

"1. The rates to be paid for natural gas delivered hereunder are subject to the jurisdiction of the Federal Power Commission and shall be those contained in Rate Schedule G-1 on file with the Federal Power Commission and lawfully in effect from time to time pursuant to the provisions of the Natural Gas Act.

"2. This agreement in all respects shall be and remain subject to the provisions of the applicable Rate Schedules and General Terms and Conditions attached to the rate schedules filed with the Federal Power Commission, all of which are by reference made a part hereof."

It is equally apparent that Corinth was not damaged by the order complained of but is actually protected by it, being assured by such order of the refund with interest of any amounts collected through the filed rates and found by the Commission to have been unreasonable.

CONCLUSION

Alabama-Tennessee respectfully submits that for the foregoing reasons Corinth's petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Excerpts from the Natural Gas Act

RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty

days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules, and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided*, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification,

or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 15 U. S. C. § 717c]

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REHEARING; COURT REVIEW OF ORDERS

SEC. 19. (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the

original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order. [52 Stat. 831 (1938); 15 U. S. C. § 717r]

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GENERAL PENALTIES

SEC. 21. (a) Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this act required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished by a fine of not more than $5,000 or by imprisonment for not more than two years, or both.

(b) Any person who willfully and knowingly violates any rule, regulation, restriction, condition, or order made or imposed by the Commission under authority of this act, shall, in addition to any other penalties provided by law, be punished upon conviction thereof by a fine of not exceeding $500 for each and every day during which such offense occurs. [52 Stat. 833 (1938); 15 U. S. C. § 717t]